IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1354 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SOMCHAND DUGARJI

Versus

NARABHAI TRIBHOVANDAS PATEL

Appearance:

1. First Appeal No. 1354 of 1980

MR JR NANAVATI for Appellant No. 1

MR SR DIVETIA for Respondents No. 1-2

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 19/12/2001

ORAL JUDGEMENT

In this appeal, the appellant - plaintiff has challenged the judgement and decree passed by the learned

City Civil Judge dated 18.1.1980 passed in Civil Suit No. 3921 of 1977, wherein, the learned Trial Judge has dismissed the suit by awarding costs to the respondent-defendants. As found from the plaint, it is the case of the plaintiff that he is in possession of the suit property within (12) years next before the institution of the suit as well as he is entitled over the suit property, which was negatived by the trial Court after considering the oral as well as documentary evidence led before him by the parties. After institution of the present First Appeal in the year 1980, the matter ripe for final hearing for about 22 years, where, according to the appellant - plaintiff, the learned Trial Judge has dismissed the suit has committed error in not accepting the case put forward by the appellant - plaintiff.

2. Mr. J.R. Nanavati, learned advocate appearing on behalf of the appellant - plaintiff has while taking me through the judgement under challenge as well as on taking me from the evidence has vehemently urged that the learned Trial Judge was not right in dismissing the suit. It is his contention that the appellant-plaintiff has prayed that the disputed property situated in Ahmedabad, Khokhra Mehmedabad Ward T.P. Scheme No. 7, Final Plot No. 74, Sub Plot No. 8/A admeasuring 2215 sq. mt. of land is belonging and in occupation of the plaintiff and to the said land on the western side, plot no. 6, there is a subplot no. 7 and on the said land there are 16 rooms and 2 half constructed rooms in total there were 18 rooms. Out of the said rooms of the ownership of the defendants on the eastern side on a oasari admeasuring about 15 ft margin, there is a plot situated of the ownership of the plaintiff being plot no. 74 being sub plot no. 8/A, in which, the defendant had illegally encroached upon the land admeasuring about 21 sq. mt. in the year 1972 and on 23rd September, 1977 on the encroached land on the western side, the defendant had encroached upon the land and further encroached upon the land at about 30 X 15 foot belonging to the plaintiff and about 50 sq. yards of land, the defendant had started construction and the construction has reached upto plinth level by putting one room, bathroom and toilet and also put up the wall admeasuring 4 foot height and accordingly, the plaintiff has sought for declaration that the defendants be directed to remove the said encroachment on the land belonging to the plaintiff and as the defendants had encroached upon the said land illegally, has prayed for mesne profit at the rate of Rs. 60/- per month from the defendants and further, prayed that the defendants be restrained from entering into the

said lands belonging to the plaintiff and also restrained them to construct over the suit lands.

3. The suit was presented before the Trial Court on 4th November, 1977. The respondents- defendants had submitted written statement by raising various contentions that the suit filed by the plaintiff is barred by limitation. It is also the case of the defendants that they and their predecessors are entitled for the land in question and they are in possession of the suit land and they have denied the case put forward by the plaintiff that they have encroached upon the land belonging to the plaintiff. It is the case of the defendants that the land of survey no. 3/1 is with the plaintiff's father and they have purchased the said land in the year 1928 and divided the same into two plots and out of those plots, plot having survey no. 3/1/1/3 admeasuring 1068 sq. yards was purchased by Prahladji Manekji Dungarji from the father of the plaintiff and the said Prahladji had constructed 18 rooms on that plot admeasuring about 1068 sq. yards. Thereafter, the father of plaintiff and Prahladji Dungarji have sold plot admeasuring 1068 sq. yards together with 18 rooms standing on the said land to one Shri Rajnikant Harishwarchandra Vyas, Shri Chunilal Mansukhlal Joshi and Shri Narsinghlal Chunilal Joshi in 1943. Shri Chunilal Joshi has transferred his interest of the suit land to one Shri Prabodchandra Narsinghlal Joshi. It is also clear that the land admeasuring about 599 sq. yards and 10 rooms are of the share of Rajnikant Vyas and remaining 469 sq. yards and 8 rooms were in the share of Shri Prabodchandra Narsinghlal Joshi. Shri Rajnikant Vyas has sold the property of his share to Shri Premchand Shivlal Modi, Shri Dahyalal Shivlal Modi and Shri Shantilal Shivlal Modi by registered sale deed dated 28th October, 1957. The defendants had purchased the rooms in the year 1971 from Shri Premchand Shivlal Modi and his brothers. It is also the case of the defendants that similarly defendant no. 2 Jethabhai Patel had purchased rooms in the year 1971 from Shri Premchand Shivlal Modi and his brothers. It is the case of the defendants that they and their predecessor were entitled for the possession of the suit lands. They have denied that they have encroached upon the suit property as contended by the plaintiff.

4. Before the trial Court, the plaintiff Somchand Dungarji has deposed in his evidence at Ex. 26 by expressing his case, which is highlighted in the suit by saying that the suit property belonging to him and it is his case that the defendants had encroached upon the suit

property, for which, he had also filed complaint before the police. It is his case that several times, he has approached the defendants for removing the said illegal construction and as the defendants have assured that they will remove from his place but inspite of that, the defendants had started construction, for which, accordingly he had approached the police and inspite of no actions being taken by the defendants, the plaintiff has filed complaint against the defendants in the police station. It is his case that he is in possession of the plot no. 8/A and for that place, a Banakhat was executed in the year 1971 and the Banakhat was executed for the purpose of construction of the said land. That lay-out plan was also passed for the purpose of construction of the said land and the plan was passed by the Town Planning Department. It is the case of the plaintiff that in year 1973 the defendants had encroached upon the land about 25 mt. and it is the case of the plaintiff that defendants had encroached upon the land of 25 mt. by putting iron hedth and also constructed a wall over the said land to the extent of 4 feet. In the cross examination, the plaintiff has admitted that a chali consisting of 18 rooms were constructed by his father Prahladji Mankaji and his father Prahaladji Mankaji had sold this land including 18 room admeasuring 1068 sq. mt. of land in the year 1943 in favour of one Shri Chunilal Mahasukhram and he has denied the suggestion that the disputed land is including 1068 sq. mt. of land, which his father Prahladji has sold to Shri Joshi Chunilal. The document ex. 36 is also executed by his father and Prahladji Mankani. With Ex. 36, map was annexed giving description of the land with the constructed rooms. The plaintiff has also examined one Shri Yogendra Jayantilal Vyas, whose deposition is at Ex. 45. He acted as a Commissioner while inspecting the site. He has prepared notes with map, which he has produced, which is at Ex. 46. I have perused the commissioner's report Ex. 46. As found from the map attached to the report, portion "A" is the room of defendants admeasuring 12 X 12 ft and in portion "B" there is the room and oasari. Portion "A" and "B" namely the rooms and oasari is in possession of defendant no. 1 and portion "C" found on the map is an open compound and portion "I" is also an open compound. In between there is one wall admeasuring 3 ft X 0' constructed by bricks and cement and on the southern side of the said open compound, there are newly constructed rooms and the area is noted down in the report. The plaintiff has also examined one Shri Manubhai Kalubhai, the plaintiff witness no. 3 at Ex. 49, who was working in the office of the District Land Record as an Assistant. He has also

produced the map and copies thereof for the year 1962, which was prepared by one Shri Shankarbhai R. Patel. The map for the year 1970 was prepared by one Shri Gordhanbhai Patel and the witness has identified the signatures of said Gordhanbhai and Shankarbhai. In cross examination, the witness has deposed that the maps were prepared, which were produced for the purpose of exact measurement for the land, but it was not possible for him to say that under whose application, such maps were prepared and when the original maps were prepared. The witness was also further examined in respect of the area and the plot numbers, wherein, the witness has shown his inability to explain the same. The witness has admitted that in respect of the measurement taken on 11.4.1962 and for preparation of such map, he has no personal knowledge about the hissas were shown on the map. The plaintiff has also examined one Manharlal Mohahlal Dave at Ex. 54, who was working in Land Record Office as surveyor. While referring to the document Ex. 50/7, a map which he has prepared and he deposed that he has taken the measurement of the Final Plot No. 74 of hissa number 8/A in the said map. According to him hissa number 5 had encroached upon from hissa no. 8/A about 7 sq. yards of land. He has further deposed that while taking such measurement, he has got old records. He has also produced these two maps, which he has prepared. In cross examination, the witness has admitted that he has done the measurement of the land as per the applications submitted by the plaintiff Shri Somchand Dungarji and witness has further admitted that at the time of taking measurements, whether he has seen any record pertaining to T.P. Scheme, the witness has also shown his ignorance by saying that he has no knowledge about the final plot no. 74 and the area of the said survey number. The plaintiff has lastly examined one Badasaheb Ashadullah Kadri at Ex. 59, who was working in the office of the City Taluka as City Surveyor. While referring to Ex. 50/5 the map, he has deposed that he has prepared the same by taking measurement and he has put his signature. To show the encroachment on the final plot no. 74 hissa no. 7, the map shows that there is an encroachment about 46 meter on plot no. 74 hissa no. 8. The said map is on the record at Ex. 60. The measurement was taken by me on 5.3.1971 and prior thereof, the measurement was done earlier twice namely on 14.4.1962 and 23.7.1970. In cross examination he has admitted that while taking measurements of final plot no. 74, he has not seen the map pertaining to the T.P. Scheme and the map and while taking the measurements, he has not taken the T.P. Scheme and map. He has further admitted in cross examination that at the time of measurement of hissa no. 7 of final plot no.

74, the owner of the hissa no. 7 is not present. he has denied that it is not correct to say that he has not done any hissa of final plot no. 74.

5. As against the evidence of the plaintiff, the defendant no. 1 - Narayanbhai Tribhovandas Patel has deposed at Ex. 62. It is found from his deposition that he is owner of two rooms situated at Municipal Census No. 297/6/1 and 297/7of T.P. Scheme no. 7 of final plot no. 74. He has purchased these rooms from the son of Premchand Shivlal namely Premchand, Shantilal and Dahyalal on 25.1.1971 and he has also purchased 27 sq. yards of land including the constructed rooms and in front of the said rooms about 10 feet of margin land under the registered sale deed. He has produced ex. 63 to show that these properties were purchased by him under the registered sale deed. Again on 3rd July, 1970, he has purchased 12.54 sq. mt. of land including the constructed rooms situated at Municipal Census No.297/6/1 and one room of 40-42 sq. mt. The property namely, the rooms situated in municipal census No. : 297/7 were purchased from three sons of Shivlal namely Premchand, Shantilal and Dahyabhai and that constructed rooms were purchased by him under the registered sale deed and the said sale deed was not found available as the same was missing. It has further found from the deposition that the defendant no. 2 has also purchased constructed rooms and open land situated in Municipal Census No. 297/6 from the son of Shivlal namely Premchand, Shantilal and Dahyalal under the registered sale deed and this property is belonging to defendant no. 2 and from the date of purchase of the said land, they are in possession of the said land. The witness has denied the case that they had encroached upon the land by putting iron hedge. In cross examination, the witness has denied that it is not correct to say that he has encroached upon the land of the plaintiff to the extent of 15 ft. and further denied that the defendant no. 2 had started construction in the year 1977. He had denied that he and defendant no. 2 had jointly constructed on the land by encroaching upon the land of the plaintiff to the extent of 13 X 15 feet. The defendant no. 2 Jethabhai Patel was examined at Ex. 64 and as found from his deposition that the constructed rooms over the final plot no. 74 of municipal census no. 2976 were purchased from the son of Shivlal namely, Premchand, Shantilal and Dahyalal under the registered sale deed dated 29th November, 1971. He has produced the photocopy of the document Ex. 65. Even prior to the purchase of the said property, he was staying in the said room as a tenant and since 1965 to 1973 on the said open land, he has constructed the water tank and chokdi and

which is found on the map at Ex. 37. The disputed property is belonging to him and he has not encroached the open land as claimed by the plaintiff. In cross examination, he has denied the suggestion that he has not put up the chokdi, water tank and toilet on the margin land of 10 feet. According to him the chokdi and toilet and water tank are situated on the north side of the land. The defendant has examined one Shantilal Modi at Ex. 66. He has deposed that he knows plaintiff and defendant Nos. 1 and 2. The witness and his two brothers Premchand and Dahyalal had jointly purchased the property from Rajnikant Vyas. The said document is proved by the defendant, which is at Ex. 67. He has also produced the map Ex. 69 showing the boundaries of the property to his brother, which was purchased by him, wherein, 10 rooms and open land were stated. When they have purchased the property under the said registered sale deed Shri Rajnikant had put them over the property and after purchasing the property, they and defendants were occupied the said rooms and he stayed in the said rooms for more than about 7 to 8 years. He has proved the document ex. 63, wherein, his brother has also put the signatures. The witness in his cross examination has also denied that in between the property of defendant no. 1 and margin portion, there were 30 feet open land and the witness has denied that after putting margin land, there is a land of plaintiff.

6. The learned trial Judge on appreciating the evidence and as found from the documents namely the saledeed in respect of the purchase of the property by opponent nos. 1 and 2 has not accepted the case of the plaintiff that he is the owner of the property and further held against the plaintiff that plaintiff has failed to prove that defendant had encroached upon the land. The learned Trial Judge has also on evidence has held that the plaintiff has failed to prove that he was in possession of the suit property as contended by him within 12 years next before the institution of the suit.

7. On considering the submission of Mr. Nanavati, learned advocate appearing for the appellant-plaintiff and on going through the judgement under challenge, it is difficult for this Court to accept the contention of Mr. Nanavati that the trial Court has committed any error while appreciating the evidence by dismissing the suit of the plaintiff. As found from the evidence, the defendant has established that the suit property has been purchased under registered Saledeed and the suit property consist of open land and constructed rooms. In my view, the learned trial Judge has rightly on appreciating the

evidence has dismissed the suit of the appellant plaintiff and the plaintiff has failed to prove about the title of the property and as found from the document namely saledeed on the record of the case, the property in question was purchased by defendant nos. 1 and 2 under the registered Saledeed. Hence, there is no substance in the present appeal and the same deserves to be dismissed. However, there shall be no order as to costs.

(D.K.Trivedi, J.)

pallav